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IN THE
Supreme Court of the United States
October Term 1982

WAYNE PARSONS d/b/a EXECUTIVE MOTORS UNLIMITED,
PAYLESS CAR RENTAL SYSTEMS,
SOUTHWEST CAR RENTALS, EXECUTIVE LEASING,
WAYNE MOTOR SALES BJP ENTERPRISES and
W BAR J, INC.,
Petitioner,
v.
FORD MOTOR COMPANY,
A.C. COLLINS FORD, INC., and
CHARLIE HILLARD FORD, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the court below properly affirm summary judgment dismissing Petitioner's allegation that Respondent manufacturer, Ford Motor Company, imposed illegal vertical restraints on certain of its dealers where, after completion of all discovery, Petitioner failed to present significant probative evidence of any genuine issue of fact regarding the existence of any alleged restraint?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Respondents adopt the statement of the opinions below submitted by Petitioner. The district court opinion, which was not included in the Appendix to the Petition, is attached as an Appendix to this Brief.

JURISDICTION

Respondents adopt the statement of jurisdiction submitted by Petitioner.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Petitioner filed this case against Respondent Ford Motor Company ("Ford") and various of its dealers on December 28, 1978. On October 31, 1980, after completion of all discovery, the United States District Court for the Northern District of Texas granted Respondents' Motions for Summary Judgment, dismissing Petitioner's allegation that Ford restrained certain of its dealers, including Charlie Hillard Ford, Inc. ("Hillard") and A. C. Collins Ford, Inc. ("Collins") from selling vehicles to Petitioner in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The district court based its holding on at least two grounds, the principal one being that:

> "Once sworn denials of the alleged conspiracy have been made, the plaintiff in an antitrust suit must produce *significant probative evidence* demonstrating the existence of a genuine fact issue in order to avoid summary judgment [citation omitted]. The plaintiff here has failed to produce such evidence, despite the extensive discovery that [has] taken place in this cause." (Appendix A) [Emphasis in original.]

On March 5, 1982, the United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling,

concluding that:

> "Plaintiff's failure to present significant probative evidence of conspiracy in response to defendants' sworn denials of all allegations rendered this case proper for summary disposition." (Pet. 14a)[1]

On April 5, 1982, the court of appeals denied Petitioner's Motion for Rehearing.

B. STATEMENT OF FACTS

1. The Nature of Respondents' Business

Respondents are Ford and two Ford dealers, who purchase vehicles from Ford which they sell at retail. During the years 1976 through 1978, consumer demand for certain Ford vehicles became so great that Ford's production capacity could not meet it (R. 381). Ford's production of these scarce vehicles was allocated to its dealers by a system which consisted essentially of two parts; a "basic allocation" of vehicles to each dealer based primarily on the dealer's historically reported sales and its inventory of unsold vehicles, and a "fleet allocation" to each Ford district (R. 382). This system is described in greater detail in the opinion of the court of appeals (Pet. 8a-9a).

Ford's dealers were free to sell vehicles to customers of their choice (R. 382). Normally, the dealer purchased vehicles from the basic allocation. Vehicles sold for fleet use, however, could be obtained from the district fleet

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[1] References marked "Pet." are to the Petition for a Writ of Certiorari filed in this Court. References marked "R." are to the official record on appeal below as prepared by the Clerk of the United States District Court for the Northern District of Texas.

allocation.[2] This provided each dealer, regardless of its normal retail volume or basic allocation, an equal opportunity to supply a fleet's requirements without diminishing the dealer's ability to supply other customers (R. 382).

2. The Nature of Petitioner's Business

In the trial court, Petitioner claimed that during the period of high consumer demand in 1976 through 1978, he engaged in a practice known in the automotive industry as "bootlegging" (R. 135-36). This practice consisted of buying a new vehicle from one Ford dealer and selling it at a profit to a second dealer, which would sell it to the public (R. 135-36). As Petitioner testified in his deposition, the success of this operation depended on his ability to obtain the vehicles from Ford's fleet allocation, despite the fact that he was not a legitimate fleet purchaser (W. Parsons depos. pp. 418, 421-22). Petitioner typically purchased vehicles under fictitious (or occasionally real) fleet names (R. 132) or under phony circumstances so that the transactions were falsely reported to Ford as fleet sales by the first dealer.[3] This method of operation enabled the dealer to obtain extra vehicles from the fleet allocation which it was willing to sell to Petitioner on more favorable terms than if it had to supply the vehicles from its own basic allocation. (Tucker depos. pp. 30-31, 50-51.)

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[2] Fleets are generally defined as operators of ten or more vehicles which are purchased for their own fleet use, with some latitude for new fleets or temporary fluctuations in fleet size. In all cases vehicles from the fleet allocation were to be registered and put into service by the fleet (R. 382).

[3] Petitioner's method of operation is set forth in greater detail in the exerpts from his testimony quoted in footnote 3 and 4 of the Court of Appeals' opinion (Pet. 6a-10a, nn. 3,4).

Because such sales to bootleggers were reported to Ford as fleet sales by the first dealer rather than retail sales by the second dealer, the transactions distorted the sales history upon which Ford's allocation system was based, made recalls difficult or impossible, and resulted in the ultimate owner receiving a partially expired warranty. Bootlegging also had several other detrimental effects on the consumer, including the increased costs added by the extra dealer's profit and the costs added by the bootlegger (See Pet. 10a-11a, n. 5; 14a-15a, n. 8).

3. Ford's Operation of Its Allocation System

Although Ford did not restrict its dealers with respect to the customers to whom they sold, it monitored the placing of orders from its fleet allocation to assure that vehicles ordered were for legitimate fleet use. If a dealer submitted an order which Ford determined not to be for legitimate fleet use, Ford gave the dealer the opportunity to have the order filled from its basic allocation (Sears depos. p. 38, Pet. 13a, n. 6).

Other than his own speculation, Petitioner submitted no evidence that Ford took any measure to prevent dealers from selling to Petitioner. The dealership personnel who were deposed testified that they were free to sell to Petitioner, although Ford, and in some cases the dealerships themselves, took steps to assure that purchases for other than fleet use came from the dealer's basic allocation (Pet. 13a, n. 6). Basically, dealers would sell to Petitioner on the same basis as any other non-fleet user. Petitioner admitted that there were always dealers willing to sell vehicles to him (W. Parsons depos. p. 225). This admission was confirmed by two of Petitioner's own witnesses (Hackler depos. p. 116; Tucker depos. pp. 64-65).

ARGUMENT

A. THE COURTS BELOW PROPERLY CONCLUDED THAT PETITIONER FAILED TO SUBMIT SUBSTANTIAL PROBATIVE EVIDENCE OF THE CONSPIRACIES ALLEGED IN THE PETITION.

As set forth in Sup. Ct. R. 17.1 this Court will grant a Writ of Certiorari only when warranted by "special and important reasons." No reason of the sort envisioned by the rule is presented by the Petition before the Court in this case. Although the Petition suggests the existence of a conflict between the Fifth Circuit's decision below and decisions by this Court and other courts of appeal, the following argument and authorities make clear that no such conflict exists.

Petitioner's entire argument for granting a Writ of Certiorari in this case *assumes* the existence of vertical restraints imposed by Ford on the Respondent dealers (See Pet. 6-7). This assumption completely disregards the court's rulings below that Petitioner failed to provide sufficient probative evidence of such restraints to avoid summary judgment. These rulings, which Petitioner does not challenge or even address,[4] make it inappropriate to to press in this Court the question which Petitioner proposes: "Whether the vertical restraints of trade . . . constitute a 'per se' violation of Section 1 of the Sherman Act" (Pet. 2).

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[4] Although the Petition makes the bare assertion that "significant probative evidence indicates" that Ford took steps to prevent dealers from selling to Petitioner (Pet. 10), it gives no indication of what that evidence might be and disregards the contrary conclusions of the courts below.

The decisions of this Court and the various courts of appeals have consistently held, as did the Fifth Circuit in this case, that once defendants have submitted sworn denials to a plaintiff's allegations of conspiracy, "summary judgment is appropriate unless plaintiff can produce significant probative evidence demonstrating the existence of a genuine fact issue" (Pet. 12a). See *e.g.*, *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, — S. Ct. — (1982); *Baum* v. *Gillman*, 648 F.2d 1292 (10th Cir. 1981); *Program Engineering, Inc.* v. *Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980). This principle follows from a straightforward reading of Fed. R. Civ. P. 56(e), which provides in relevant part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The deposition testimony of the numerous Ford employees and dealer personnel, developed through extensive discovery, uniformly revealed that dealers were free to sell to Petitioner on the same basis as any other purchaser (*See* references in Pet. 130, note 6). Unless Petitioner met the criteria required of any other purchaser of vehicles from the fleet allocation, the vehicles sold to him were to come from the dealer's basic

allocation. *Id.* The lower courts properly held that summary judgment was warranted by Petitioner's failure to adduce significant probative evidence that Ford had restrained dealers from selling to him.[5]

B. EVEN IF PROVED, THE ALLEGED VERTICAL CONSPIRACIES WOULD NOT VIOLATE THE SHERMAN ACT.

Even if the decisions below had turned on the legality of the alleged vertical restraints rather than Petitioner's failure to adduce evidence of their existence, no appropriate issue would be presented for this Court's review. Petitioner asserts that Ford entered into vertical conspiracies with each of the Respondent dealers "to deprive him of the opportunity to purchase new Ford automobiles" and "to freeze [Petitioner] out of the market involving the transfer of new Ford automobiles from one dealer to another dealer" (Pet. 5). Petitioner inappropriately characterizes these alleged conspiracies as "refusals to deal" and vertical "customer restrictions" which Petitioner claims to be *per se* violations of the Sherman Act under various decisions of this and other Courts (Pet. 7,8).

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[5] As Respondents pointed out below, Petitioner fell short of establishing a Sherman Act violation in numerous other respects, including failure to show that the alleged series of vertical conspiracies unreasonably restrained trade, that they injured competition, or that they were motivated by anticompetitive intent. In view of the lower court's dispositive holding as to lack of significant probative evidence of the existance of alleged restraints, these points need not be addressed herein except to underscore Petitioner's pervasive failure to adduce significant probative evidence to sustain his Sherman Act claim.

It should be emphasized that throughout this action, Petitioner has alleged purely vertical customer restraints, and has made no allegations nor proof of any horizontal restraint or effect. Yet the Petition is devoid of any discussion of *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977), under which the alleged conspiracies, even if proven, would clearly be the sort which this Court held to be judged by the "Rule of Reason."[6] See, *e.g.*, *The Sports Center, Inc.* v. *Riddell, Inc., Judge Little Company and Hale & Jones, Inc.*, 1982-1 Trade Cas. ¶ 64,688 (5th Cir. 1982); *Borger* v. *Yamaha Intl. Corp.*, 625 F.2d 390 (2d Cir. 1980); *Cowley* v. *Braden Indus.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 100 S.Ct. 2942 (1980).

As pointed out in Ford's brief in the Fifth Circuit (pp. 26 and 27), the cases relied upon by Petitioner do not support the premise of Petitioner's argument, and are clearly distinguishable from this case. In *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321 (1966), several GM dealers attempted among themselves to preclude other dealers from selling to "discount houses" which competed directly with them. They eventually enlisted General Motors' help in doing so and this Court found the resulting horizontal restraint to be violative of the antitrust laws. The record makes clear that no such horizontal element is either alleged or proven in this case (W. Parsons depos. pp. 50, 244, 352). In *General Motors*, as well as *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975) and *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966) (all pre-*Continental T.V.* cases), the manufacturer imposed restraints at the insistence of dealers seeking to

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[6] Given the numerous detrimental effects of bootlegging (see Pet. 10a-11a, n. 5), even had the alleged restraints existed, Respondents respectfully submit that they would have been lawful.

squeeze out sellers in direct competition with them in the retail market. Here, the only conspiracies alleged are restraints unilaterally imposed by Ford on individual dealers selling to Petitioner. Petitioner was not selling in competition with Ford dealers, but was merely selling vehicles from one Ford dealer to another (W. Parsons depos. p. 244).

Similarly, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126 (1972), involved horizontal restrictions among direct competitors, not vertical restrictions imposed by an independent supplier. In sum, Petitioner's argument that a purely vertical customer restraint is a *per se* violation of the Sherman Act is without merit. It runs contrary to this Court's ruling in *Continental T.V.*, has no support in the decisions of this Court or the courts of appeal since *Continental T.V.*, and is not even supported by the cases cited in the Petition.

In the closing pages of his argument, Petitioner suggests that the mere operation of Ford's fleet allocation may somehow violate the Sherman Act (Pet. 12-13). Petitioner's argument is necessarily imprecise because Petitioner's bootlegging business depended for its success on the fleet allocation's existence (and his ability to manipulate it through the use of falsified orders). Therefore, Petitioner seems to attach some significance to the fact that Ford determined eligibility for the allocation and took steps to see that ineligible orders were filled from the basic allocation instead (Pet. 12-13). As the court of appeals stated:

> "The fleet allocation system was clearly designed to facilitate sales to legitimate fleet end-users. [Petitioner] admittedly did not fit in that category" (Pet. 13a, n. 7).

Clearly, if Ford could legitimately establish the fleet allocation, Ford could determine eligibility for fleet allocation and take reasonable steps to prevent ineligible access to it. It would be counterproductive to have a separate fleet allocation if dealers could use it for whatever orders they chose.

Ford had legitimate, compelling business reasons to create the fleet allocation to enable dealers to supply the needs of fleet users and to see that the allocation was not abused. Courts which have considered a manufacturer's implementation of such allocation systems have not found them to violate the antitrust laws. See, *e.g.*, *National Auto Brokers Corp.* v. *General Motors Corp.*, 572 F.2d 953, 960 (2d Cir. 1978), *cert. denied*, 439 U.S. 1972 (1979); *Tripper Corp.* v. *Chrysler Corp.*, 484 F. Supp. 507, 511 (N.D. Cal. 1980), *aff'd. by unpub. mem. op.*, (9th Cir., August 26, 1981).

CONCLUSION

The Petition for a Writ of Certiorari filed in this case does not present an appropriate issue for granting such a Writ. After completion of discovery, and based upon well-established standards which Petitioner has not challenged, the courts below ruled that summary dismissal of Petitioner's claims of conspiracy was warranted under Fed. R. Civ. P. 56, based on Petitioner's lack of significant probative evidence. Review of that ruling by this Court is neither requested by the Petition nor appropriate. In view of the total lack of authority to support Petitioner's contention that purely vertical

customer restrictions should be held illegal *per se* under Section 1 of the Sherman Act, the question Petitioner proposes for review would not be appropriate even if the alleged conspiracies could be proved. The Petition should be denied.

Respectfully submitted,

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APPENDIX

ORDER

(In the United States District Court
for the Northern District of Texas
Dallas Division)

(Filed Oct. 31, 1980)

(WAYNE PARSONS, Plaintiff v. FORD MOTOR COMPANY, ET AL, Defendants, CIVIL ACTION NO. CA-3-78-1548-D)

Came on for consideration the defendants' Motions for Summary Judgment. The court has carefully considered the motions, the papers filed in connection with it, the oral arguments presented at the hearing on the motions and the extensive record in this case and is of the opinion that the motions should be granted.

Although the use of the summary judgment procedure should be approached with caution in antitrust case[s], *see e.g. Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962), it is appropriate to use this procedure in antitrust cases when the circumstances of the case merit summary disposition. *See Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389 (5th Cir. 1976). The circumstances of this cause present such an opportunity.

One element of any case which alleges violations of section 1 of the Sherman Act is a showing that the defendants conspired or combined to act. The plaintiff in this cause has failed to meet this initial burden. Although the plaintiff has alleged that the defendants, through a series of vertical conspiracies between Ford and each of its dealers, conspired to put him out of business, these allegations alone will not suffice to raise a material question of fact in light of the sworn denials contained in the record. Once sworn denials of the

alleged conspiracy have been made, the plaintiff in an antitrust suit must produce *significant probative evidence* demonstrating the existence of a genuine fact issue in order to avoid summary judgment. *Solomon, supra*. The plaintiff here has failed to produce such evidence, despite the extensive discovery that that [*sic*] taken place in this cause. For this reason summary judgment is appropriate on plaintiff's federal antitrust action in this case.

In addition, however, summary judgment is appropriate for at least one other reason. Even if there was significant probative evidence of a series of vertical conspiracies as alleged by the plaintiff, there is *no* evidence of casuation [*sic*] which is also required for a prima facie case under the Sherman Act. Plaintiff admits that he could *always* get cars from some Ford dealers throughout the period in question. Therefore, any loss of sales suffered by the plaintiff was not due to an inability to get cars, but can, instead, be attributed to other factors such as the opinion letter from the Texas Attorney General's office which states that bootlegged cars were used, not new, cars.

The plaintiff in this case has also raised state law claims under the *Tex. Bus. & Comm. Code* §§ 15.02, 15.03, and 15.04. Since the summary disposition of the federal antitrust claim removes the jurisdictional basis for the plaintiff's pendent state claims, *see United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), this court is of the opinion that these claims should also be dismissed without prejudice. *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979).

It is so ORDERED.

Dated this 31 day of October, 1980.

By: /s/ Robert Hill
United States District Judge